

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
October 8, 2008 Session

**JERMAINE JORDAN v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Davidson County**  
**No. 2006-C-1984 J. Randall Wyatt, Jr., Judge**

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**No. M2008-00623-CCA-R3-PC - Filed May 6, 2009**

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The petitioner, Jermaine Jordan (hereinafter “the petitioner”), pleaded guilty to attempted first degree murder and especially aggravated kidnaping for which he received a sentence of seventeen years’ imprisonment. He now appeals from the Criminal Court of Davidson County’s denial of post-conviction relief arguing ineffective assistance of counsel based on trial counsel’s failure to adequately interview and investigate witnesses. The petitioner further alleges that he entered an involuntary and unknowing guilty plea because counsel erroneously advised him that he would be eligible for parole. Following our review of the record, we affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

John David Wicker Jr., Nashville, Tennessee, for the appellant, Jermaine Jordan.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth Bingham Marney, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Christopher Buford, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

On April 27, 2007, the petitioner pleaded guilty to attempted first degree murder and especially aggravated kidnaping for which he received concurrent sentences yielding an effective sentence of seventeen years. There was no direct appeal. Less than two months later, on June 12, 2007, the petitioner filed a pro se petition for post-conviction relief. The court appointed counsel, and on September 12, 2007, an amended petition for post-conviction relief was filed. On November 19, 2007, the post-conviction court held a hearing on the petition and later filed a detailed written order denying the petitioner relief because there was insufficient evidence to support the petitioner’s claims of ineffective assistance of counsel. The petitioner then filed the instant appeal.

**Post-Conviction Hearing.** The petitioner testified that he was represented by two different attorneys prior to being represented by current counsel.<sup>1</sup> The petitioner was advised by prior counsel that the initial offer was eight years at thirty percent. A day or two later, prior counsel advised him that his offer had increased to sixteen years. The petitioner wanted a new attorney because prior counsel did not spend time on his case and did not fully advise him of the charges or the applicable enhancement factors. Current counsel was later appointed to represent the petitioner. The petitioner admitted that current counsel fully explained the charges he was facing and analyzed the individual counts in the presentment.

The petitioner further testified that Mandy Jordan, the victim, tried to contact him twice while he was in custody, using an assumed name. When asked whether current counsel instructed him to contact the victim, he stated, "Maybe. And I -- and I let him know that I don't think this would be a good idea to call this person 'cause it -- I knew who it was, you know. And he said, no we're gonna -- he said go ahead and call as a new strategy. The new strategy, I got two charges behind there." The petitioner stated he followed counsel's advice and returned the phone call. When the petitioner returned the phone call, the victim answered and recorded their conversation which was ultimately used against him. He received an additional six months on his sentence. He stated current counsel did not file any motions, and no background investigation was done. The week the petitioner's trial was scheduled, current counsel came to visit him. He decided to accept the State's offer to plead guilty because he felt "this [was] the best [he was] gonna get."

On cross examination, the petitioner did not dispute that prior counsel represented him for approximately one year. The petitioner further agreed that he shouted, used profanity, and got "emotional" with prior counsel but denied threatening to kill him. The petitioner admitted to returning the phone call to "his step-sister, Erica," even though he knew he did not have a step-sister. The petitioner also admitted to receiving letters from current counsel which detailed the charged crimes. In regard to his guilty plea, the petitioner stated,

Everything happened so fast, you know. I was pretty much in shock and disbelief at the whole situation. Yeah. I signed it. I don't know what the [sic] right mind I was in when I signed it. . . I -- was thinking about my family and just trying to put the whole situation as quick as possible.

The petitioner stated that he "was under the misconception that . . . [he] would be eligible for good time credits [] and program credits." He admitted to signing the plea petition which indicated that current counsel advised him of his constitutional rights. The petitioner also admitted to being familiar with the court system and having a criminal history consisting of at least five prior convictions. On re-direct examination, the petitioner explained that he pleaded guilty only because current counsel told him that he could "earn up to sixteen days a month for good time credits and program credits."

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<sup>1</sup>We will refer to the petitioner's first counsel as prior counsel and second counsel as current counsel.

Prior to entering a guilty plea, the petitioner signed a form entitled, “Petition to Enter Plea of Guilty.” The form detailed the petitioner’s rights and explained the charges and the potential penalty ranges. Petitioner’s counsel wrote the following on the form in the space provided: “especially aggravated kidnaping 17yrs to serve 100% (eligible up to 15% good honor time).” A transcript of the guilty plea colloquy was entered into evidence.

Current counsel testified that he had been appointed to represent the petitioner in February of 2007. He received the relevant information from prior counsel’s file and began to discuss the case with the petitioner. Counsel testified that he met with the petitioner on March 18, 2007, and went over pictures, transcripts from the preliminary hearing, arrest reports, and a recording of a 911 call. Counsel stated that the petitioner interacted with him about the information “very good.” Counsel stated the petitioner appeared to understand what was going on and was able to intelligently comprehend what was happening.

Current counsel further stated he wrote at least three letters to the petitioner. Counsel testified it was his practice to include a chart with the letters that explained every count that was charged, the class of felony, and the sentence exposure. Counsel explained that he hand delivered the letters to the petitioner. Two of the letters explained that especially aggravated kidnaping carried a sentence range of “fifteen to sixty years at one hundred percent.” Another letter further explained that “especially aggravated kidnaping would be served at one hundred percent minus fifteen percent good and honor time that you could earn which means you could serve around fourteen and a half years.” Counsel stated that he was able to discuss the plea petition with the petitioner and that the petitioner never indicated that he did not understand anything.

In regard to the phone call, current counsel stated that the petitioner told him about the prior occasions the victim had attempted to contact him, but the petitioner was unsure whether it was the victim in this call. Counsel was concerned the call might be from someone who had information about the case and advised the petitioner to return the phone call, but not to talk if the victim answered.

**Standard of Review.** Post-conviction relief is only warranted when a petitioner establishes that his or her conviction is void or voidable because of an abridgement of a constitutional right. T.C.A. § 40-30-103 (2006). Our supreme court has held:

A post-conviction court’s findings of fact are conclusive on appeal unless the evidence preponderates otherwise. When reviewing factual issues, the appellate court will not re-weigh or re-evaluate the evidence; moreover, factual questions involving the credibility of witnesses or the weight of their testimony are matters for the trial court to resolve. The appellate court’s review of a legal issue, or of a mixed question of law or fact such as a claim of ineffective assistance of counsel, is de novo with no presumption of correctness.

Vaughn v. State, 202 S.W.3d 106, 115 (Tenn. 2006) (internal quotations and citations omitted). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. Id.; see also T.C.A. § 40-30-110(f) (2006). Evidence is clear and

convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn from it. Vaughn 202 S.W.3d at 116 (citing Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998)).

Vaughn further repeated well-settled principles applicable to claims of ineffective assistance of counsel:

The right of a person accused of a crime to representation by counsel is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. Both the United States Supreme Court and this Court have recognized that this right to representation encompasses the right to ‘reasonably effective’ assistance, that is, within the range of competence demanded of attorneys in criminal cases.

Vaughn, 202 S.W.3d at 116 (internal citations omitted).

In order to prevail on an ineffective assistance of counsel claim, the petitioner must establish that (1) his lawyer’s performance was deficient and (2) the deficient performance prejudiced the defense. Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984) and Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). “[A] failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.” Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

A petitioner successfully demonstrates deficient performance when the clear and convincing evidence proves that his attorney’s conduct fell below an objective standard of “reasonableness under prevailing professional norms.” Id. at 369 (quoting Strickland, 466 U.S. at 688). Prejudice arising therefrom is demonstrated once the petitioner establishes “a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 370. “A ‘reasonable probability is a probability sufficient to undermine confidence in the outcome.’” Id. (quoting Strickland, 466 U.S. at 694).

**I. Ineffective Assistance of Counsel.** The petitioner alleges ineffective assistance of counsel based on: (1) counsel’s failure to adequately investigate or interview witnesses; and (2) counsel’s advice that the petitioner would be eligible for parole. The State argues that these issues have been waived and that the petitioner has failed to establish deficient performance and prejudice required for ineffective assistance of counsel. We agree with the State.

First, the petitioner alleges counsel was ineffective because he failed to adequately investigate “Erica,” the person who called the petitioner while he was incarcerated, and was ultimately determined to be the victim, Mandy Jordan. Next, he argues counsel was ineffective because he “provided erroneous advice regarding parole.” However, as argued by the State, these issues have been waived because they were not raised before the trial court in the petitioner’s pro se petition nor his amended petition for post-conviction relief.

“Ineffective assistance of counsel is generally a single ground for relief under the post-conviction statute. [T]he fact that such violation may be proved by multiple acts or omissions does not change the fact that there remains only one ground for relief.” Thompson v. State, 958 S.W.2d 156, 161 (Tenn. Crim. App. 1997)(internal citations and quotations omitted); see also Erika Louise Bunkley Patrick v. State, No. W2004-02217-CCA-R3-PC, 2006 WL 211824, at \*10 (Tenn. Crim. App., at Jackson, Jan. 24, 2006). Thus, all factual allegations must be presented in one claim. See T.C.A. § 40-30-106(d). A petitioner may not re-litigate a claim of ineffective assistance of counsel “by presenting new and different factual allegations” on appeal. Erika Louise Bunkley Patrick, 2006 WL 211824, at \*10 (citing Thompson, 958 S.W.2d at 161)); Roger Clayton Davis v. State, No. 03C01-9902-CR-00076, 2000 WL 21307 (Tenn. Crim. App., at Knoxville, Jan. 14, 2000), perm. to appeal denied (Tenn. Sept. 5, 2000)). The petitioner argues for the first time in this appeal additional factual allegations in support of his ineffective assistance of counsel claim which were not raised in his petition for post-conviction relief or in his amended petition for post-conviction relief. Moreover, the post-conviction court did not make any findings of fact on the factual allegations that the petitioner now raises in this appeal. Erika Louise Bunkley Patrick, 2006 WL 211824 at \*10 (citing Tenn. R. App. P. 36(a) (No “relief may be granted in contravention of the province of the trier of fact.”)). Accordingly, this issue has been waived.

Even if we considered the petitioner’s new grounds for his ineffective assistance of counsel claim, we have reviewed the record in its entirety, and the proof demonstrates that counsel advised the petitioner to return the phone call; however, counsel stated that “if it was [the victim] not to say anything, not to have a conversation at all because that would be a violation.” After receiving this advice, the petitioner returned the phone call, recognized that it was the victim’s voice, and chose to engage in a telephone conversation with the victim. The phone call was recorded and ultimately used against the petitioner. Regarding the erroneous parole advice, the post-conviction court found that “the Petitioner [was] vague as to the specific constitutional issues that existed with respect to the evidence in this case.” However, the post-conviction court addressed the petitioner’s claim that counsel “failed to adequately explain the charges or the consequences of accepting the State’s offer and entering a guilty plea” and found the following:

[T]he Petitioner conceded at the instant hearing that [counsel] explained the charges he faced and the elements of each crime which the State had to prove at trial. The Court finds that [counsel] testified that he explained the plea offer to the Petitioner. The Court finds that [counsel] testified that he explained the ramifications of proceeding to trial and the possible sentencing ranges the Petitioner would face if convicted. The Court finds that [counsel] testified that he reviewed the plea petition with the Petitioner and answered any questions. The Court finds that the Petitioner was again informed of his rights by the Court at the time of his plea. The Court finds that the Petitioner presented no proof that he was uninformed of the charges he faced or that he was not cognizant of the consequences of accepting the State’s plea offer.

The post-conviction court’s determination is supported by the record. The petitioner was properly advised by counsel regarding parole. Accordingly, the petitioner has failed to establish deficient performance or prejudice as a result.

**II. Guilty Plea.** The petitioner similarly argues for the first time on appeal that his guilty plea was not knowingly and voluntarily entered because he was advised by counsel and the court that he would be eligible for parole. Because this issue was not raised before the post-conviction court, the State contends the petitioner is barred from doing so now. Based on the above analysis and authority, we agree with the State, and conclude that the petitioner has waived this issue. However, even if we construe the petitioner's claim in his amended petition that he was not fully informed "as to the consequences of agreeing to his sentence," he is not entitled to relief.

When determining the constitutional validity of a guilty plea, we follow the well established standards announced in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, (1969), and State v. Mackey, 553 S.W.2d 337 (Tenn.1977). State v. Pettus, 986 S.W.2d 540, 542 (Tenn.1999). In Boykin, the United States Supreme Court held that there must be an affirmative showing in the trial court that a guilty plea was voluntarily and knowingly given before it can be accepted. 395 U.S. at 242, 89 S.Ct. at 1711. In Mackey, the Tennessee Supreme Court also required an affirmative showing of a voluntary and knowledgeable guilty plea, namely, that the defendant has been made aware of the significant consequences of such a plea. Pettus, 986 S.W.2d at 542. A plea is not "voluntary" if it results from ignorance, misunderstanding, coercion, inducements, or threats. Blankenship v. State, 858 S.W.2d 897, 904 (Tenn.1993).

The trial court may look at a number of circumstantial factors in determining whether the plea represents a voluntary and intelligent choice among the alternatives available to the defendant. Blankenship, 858 S.W.2d at 904. These factors include: (1) the defendant's relative intelligence; (2) his familiarity with criminal proceedings; (3) whether he was represented by competent counsel and had the opportunity to confer with counsel about alternatives; (4) the advice of counsel and the court about the charges against him and the penalty to be imposed; and (5) the defendant's reasons for pleading guilty, including the desire to avoid a greater penalty in a jury trial. Id. at 904-05.

In this case, the proof at the post-conviction hearing demonstrated that counsel wrote at least three letters to the petitioner explaining every count that was charged, the class of felony, and the sentence exposure. Counsel explained that he hand delivered the letters to the petitioner, two of which explained that especially aggravated kidnapping carried a sentence range of "fifteen to sixty years at one hundred percent." Another letter further explained that "especially aggravated kidnapping would be served at one hundred percent minus fifteen percent good and honor time that you could earn which means you could serve around fourteen and a half years." Counsel testified that he was able to discuss the plea petition with the petitioner and that the petitioner never indicated that he did not understand anything. The plea petition form explained the charges and the potential penalty ranges. Petitioner's counsel wrote the following on the form in the space provided: "especially aggravated kidnapping 17yrs to serve 100% (eligible up to 15% good honor time)."

At the plea colloquy, the following exchange occurred:

THE COURT: Mr. Jordan, your case was actually around here yesterday. And then it was -- and it was, apparently, set, you know, and going to be tried and then there was, maybe, a motion, I think filed by your lawyer, Mr.

Shabazz, to continue it because of the fact that he had just inherited the case, I think was the language he used. And you felt like he needed to have enough time to be prepared. And so I said, well, we'll do that. We'll pass it until June the 4<sup>th</sup>, I think we said. So that was fine. And so now, today, one day later here, and apparently, you have decided to enter a plea of guilty on this, and we won't be having that trial on June the 4<sup>th</sup>. Did -- did you understand that? And is this what you've decided to do?

THE DEFENDANT: Yes, sir.

THE COURT: Now, you're pleading guilty this morning to Count 1, which is a count having to do with Attempted First Degree Murder. And that's a charge where you would have been charged with Attempting to Commit First Degree Murder, which is the willful or knowing and premeditated killing of another person. This is the attempt to do that. And it carries a possible sentence of somewhere between fifteen and sixty years. Probably, in your case, it might be fifteen to twenty-five. Whichever it would be, you're pleading guilty and are going to receive a seventeen-year sentence on that charge, Attempted First Degree Murder. And that would need to be served at one hundred percent. And did you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now, you're also pleading guilty to Attempted Especially -- to-- to excuse me-- to Aggravated Kidnaping. And that's another case that carries a sentence of anywhere between fifteen and sixty years. In your case, again, it would probably be fifteen to twenty-five, but you're receiving a sentence of seventeen-years on that [count] to run at a hundred percent, but it's going to run concurrent with Count 1 . . . And did you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now do you also understand that these are both felonies. And when you are paroled in these cases in the future, if you are convicted of some crimes in the future, these convictions from today could be considered later and might increase some future sentence if you were convicted of a whole new charge again, later, in your life. Do you understand that?

THE DEFENDANT: Could you repeat the part about the parole, again?

THE COURT: Yes. When you are paroled, sometime later in your life, if you should be charged and convicted with some wholly new case, these

convictions from today could be looked at and could be considered, if you had some new charges, and it might have a bearing on what sentence you would get in the future. It might increase it, in other words. Do you understand that?

THE DEFENDANT: Are you saying I could get paroled on these charges?

THE COURT: You will eventually get paroled on these charges after you serve the seventeen years.

THE DEFENDANT: Oh.

THE COURT: And then, later on in your life --

THE DEFENDANT: Okay.

THE COURT: -- got charged with something else totally new--

THE DEFENDANT: Yeah.

THE COURT: -- in your whole life, the courts could look at these convictions from today, and that might have a bearing on what sentence you'd get later on these new other cases, which we hop you don't have any other cases.

THE DEFENDANT: Okay. Let's hope I don't have any--

THE COURT: I do, too. And everybody else probably does

THE DEFENDANT: I understand.

THE COURT: Okay.

THE DEFENDANT: Yes, sir.

Even though the trial court incorrectly stated "paroled" instead of "released," the transcript of the guilty plea, in addition to the letters and advice of counsel, demonstrate that the petitioner was properly advised of his parole eligibility. He, therefore, entered a knowing and voluntary guilty plea and is not entitled to relief.

**Conclusion.** Based on the foregoing, the judgment of the post-conviction court is affirmed.

CAMILLE R. MCMULLEN, JUDGE